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1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	CS Docket No. 95-61

To: The Commission

COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments in response to the Notice of Inquiry ("NOI") in the above-referenced proceeding. OpTel, through its subsidiaries, operates private and franchised cable systems in several regions of the United States. In many of these regions, OpTel's systems are providing competition to well-established franchised cable operators. In the NOI, the Commission requests information regarding the extent to which private cable systems are able to compete against franchised cable operators for subscribers in multiple dwelling units ("MDUs") and whether there are "barriers to increased competition by [private cable] systems."[1] In addition, the Commission asks for comment on the impact of perpetual exclusive contracts on competition in the market for video programming.[2]

OpTel's comments speak to these issues and demonstrate that franchised cable operators have been abusing their market power to coerce MDU owners into perpetual exclusive contracts which foreclose competition from new market entrants. In addition, franchised cable operators have the opportunity and incentive to engage in predatory pricing to prevent competitors from gaining a foothold in MDUs. Finally, the Commission's restrictive definition of inside home wiring discourages competition in video programming services provided to MDUs and facilitates the anticompetitive behavior of the franchised cable operators.

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1 NOI ¶¶ 36, 37.
2 Id.

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List A B C D E

I. Competition for Video Programming Service to MDUs Has Grown as Private Cable Systems Have Begun to Challenge Dominant Franchised Cable Operators.

As the Commission knows, the present market for multichannel video programming services is highly concentrated. The vast majority of cable systems in the United States have franchises from local governments, which, in effect, give the cable systems a legal monopoly to provide multichannel video services in their franchise areas. Only a tiny fraction of the 10,000 communities served today by cable television have more than one franchised cable operator so that most consumers are deprived of the benefits of competition, including lower prices, better service, and a wider selection of video products from which to choose.

Private cable operators, who offer multichannel video services to an apartment building or multiple dwelling unit ("MDU"), or several commonly-owned MDUs, have begun to fill the competitive void. Since such private cable systems are not defined as "cable systems,"[3] they are not foreclosed from competing against franchised cable operators by restrictive local franchising requirements and, therefore, they presently are the only practical, effective source of competition to franchised cable operators. Although direct broadcast services ("DBS") offer some hope of competition to cable operators in single family residences, DBS cannot, as a practical matter, provide service to all residents in an MDU. Recognizing that private cable presently is the only source of effective competition, franchised cable operators have leveraged their market power to enter into anticompetitive contracts with owners of MDUs.

Franchised cable operators have used this leverage in two principal ways. First, in many areas of the country, franchised cable operators have required owners of MDUs to enter into contracts which exclude competitors, effectively, in perpetuity. Second, despite Section 623(d) of the 1992 Cable Act, which prohibits discriminatory pricing, cable operators have targeted discounts to MDU owners that are predatory and that are cross-subsidized by rates charged to individual homeowners, where there is no private cable or other effective competition.

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[3] See 47 U.S.C. § 522(7)(B); FCC v. Beach Communications, Inc., 113 S. Ct. 2096 (1993).

II. THE USE OF PERPETUAL CONTRACTS BY FRANCHISED CABLE OPERATORS FORECLOSES MDUS TO NEW ENTRANTS AND INHIBITS THE GROWTH OF COMPETITION.

Contracts for the "perpetual" right exclusively to provide video services to an MDU prevent new entrants from entering the market and thereby inhibit competition. Although exclusive contracts with the owners of MDUs are a reasonable business practice, given the capital investment required to install multichannel video technology in an MDU, there is no reasonable business need for those exclusive contracts to be perpetual. Franchised cable operators use such contracts only to foreclose the MDU to competing service providers. In order for competition to flourish, customers must be allowed to switch to competitive service providers once they become available in the marketplace.

Such contracts are being used, for example, by franchised cable operators across the nation. For example, in Phoenix, Arizona, it is common practice for the multiple system operator ("MSO") that serves the region, to require MDU owners wishing to receive cable service to enter into an agreement providing that the MSO will be the exclusive provider of video services in the MDU "for a period equal to the term of the franchise granted to the Operator by the franchising authority, and any extension thereof. " Since franchising agreements typically run from 10-25 years, and since franchises are generally renewed and extended with little or no debate, these exclusive contracts are, in effect, perpetual.

One simple, but effective, guard against anticompetitive conduct by franchised cable operators would be a prohibition on video service contracts which are of essentially unlimited duration. Until the marketplace is truly competitive, franchised cable operators should be prohibited from entering into contracts to provide video programming services that have a duration of longer than the cable system's then-current franchise term. Such a provision would allow customers who entered into agreements with the dominant franchised cable operator periodically to reevaluate their choice of service providers once competition becomes available.[4]

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[4] On two previous occasions, the Commission has imposed "fresh look" obligations on dominant communications entities to prevent them from using their market power in anticompetitive ways. The "fresh look" doctrine is so-named because it allows customers committed to long-term contracts with an entrenched monopolist to take a fresh look at the marketplace once competition is introduced and to escape those contracts, if they so desire. <u>See</u> <u>Competition in the Interstate</u>

III. PREDATORY PRICING BY FRANCHISED CABLE OPERATORS IS INHIBITING THE GROWTH OF COMPETITION IN THE MARKET FOR MULTICHANNEL VIDEO PROGRAMMING.

Currently, cable operators are required to employ a uniform rate structure throughout their franchised areas.[5] This requirement is intended to prevent cable operators from engaging in predatory pricing and cross-subsidization. Although cable operators may provide discounts to MDUs, those same discounts must be available to all similarly situated MDUs based on some uniform rate structure. Thus, cable operators cannot engage in predatory pricing in individual MDUs to undercut would-be competitors or new entrants. Despite the existing prohibition on discriminatory pricing, cable operators have the incentive to target discounts to MDU owners that are predatory and that are cross-subsidized.

Predatory pricing will become a serious problem if telecommunications legislation is passed later this year. For instance, legislation currently pending in the House of Representatives threatens to vitiate the uniform rate requirement and make such rate discrimination legal, either by eliminating the uniform rate requirement entirely or by limiting its applicability to those services that are regulated by the Commission or a franchising authority. Because the remainder of the legislation substantially deregulates many aspects of cable service, little would remain of the uniform pricing requirement in either case.

Diminishing the protection of the uniform rate requirement would inhibit the growth of competition in multichannel video programming and would leave cable ratepayers vulnerable to discriminatory pricing. In any MDU in which a private cable system was seeking to provide service, the local franchised cable operator could offer the MDU owner substantially discounted rates, subsidized by subscribers in other parts of the franchised area, to undercut the private cable operator and foreclose competition. Thus, the market would remain monolithic and ratepayers who do not have access to alternative sources of video programming will be funding discounted rates for subscribers where potential competition exists.

Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992); Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd 7341, 7342-43 (1993), vacated on other grounds, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (1994).

[5] 47 U.S.C. § 543(d).

For this reason, the Commission should oppose any legislative change that would facilitate price discrimination by franchised cable operators and retain its jurisdiction over the rates charged by franchised cable operators wherever possible. Limiting the ability of dominant cable operators to undercut new entrants on a sub-market by sub-market basis will encourage the development of competition and protect subscribers from unfair and discriminatory rates.

IV. EFFECTIVE ACCESS TO MDU CABLE INSIDE HOME WIRING IS NECESSARY TO THE DEVELOPMENT OF COMPETITION IN VIDEO PROGRAMMING SERVICE.

Even where franchised cable operators have not entered into explicitly unlimited duration contracts, restrictions on access to cable home wiring in MDUs make it extremely impractical, and in some cases impossible, for competing providers of video programming to compete for subscribers in an MDU. In the 1992 Cable Act, Congress sought to provide competing video programming providers with access to existing cable home wiring.[6] Effective access to cable home wiring, Congress determined, would allow subscribers to switch from a cable operator to a competing video programming provider without undue delay disruption of service.[7]

In its order implementing this aspect of the 1992 Cable Act, however, the Commission defined cable home wiring as "wiring located within the premises or dwelling unit of the subscriber" and established the "demarcation point" in MDUs "at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit."[8] This definition and demarcation point do not provide alternative video programming providers with effective access to a subscriber's existing cable wiring and operate, therefore, to further entrench already dominant franchised cable operators.

In most cases, a demarcation point for cable home wiring twelve inches outside of the subscriber's premises will provide essentially no access for alternative providers to cable home wiring in MDUs. Although some new MDUs

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[6] See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sections 2(a)(6), 2(b)(1-2), 106 Stat. 1460 (1992); see also H.R. Rep. No. 628, 102d Cong., 2d Sess. at 118 (1992); S. rep. No. 92, 102d Cong., 1st Sess. at 23 (1991).

[7] Id.

[8] Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring, 8 FCC Rcd 1435, ¶ 12 (rel. Feb. 2, 1993).

allow for access to cable wiring near the door of each individual unit, the vast majority of older MDUs have no such access. Wire located within twelve inches of a subscriber's premises may be buried in load-bearing walls or concealed in conduit and, therefore, not readily accessible without causing substantial damage to the building or the subscriber's apartment.

In order to give effect to Congressional intent and provide practical access to cable home wiring in MDUs, the demarcation point must be a point outside of the subscriber's premises at which the individual subscriber's wires can be detached from the cable operator's common wires without damaging the MDU and without disrupting service to other customers (*i.e.*, home wiring in MDUs should include the entire "home run"). Such a demarcation point will allow customers to switch effortlessly between alternative service providers and thereby promote competition in the multichannel video programming marketplace.

CONCLUSION

Franchised cable operators presently are able to inhibit the development of competition in the market for multichannel video programming by coercing owners of MDUs into contracts that extend in perpetuity and by engaging in predatory pricing when potential competitors enter the market. In addition, the Commission's current definition of the demarcation point for home wiring in MDUs discourages subscribers and MDU owners from switching to alternative video programming providers. Limiting the ability of franchised cable operators to enter into perpetual contracts or to engage in predatory pricing, and liberalizing the definition of home wiring in MDUs, would help to foster the growth of competition in the video programming market.

Respectfully submitted,

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June 30, 1995

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Optel, Inc. was hand-delivered this 30th day of June, 1995, to the following:

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